INTERIOR BOARD OF INDIAN APPEALS

Winlock Veneer Co. v. Acting Juneau Area Director, Bureau of Indian Affairs

20 IBIA 3 (05/02/1991)

Reconsideration denied:
20 IBIA 100

Related Board cases:
22 IBIA 314
28 IBIA 149
Reconsideration denied, 28 IBIA 149

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

WINLOCK VENEER C0.
v.
ACTING JUNEAU AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-35-A Decided May 2, 1991

Appeal from a decision cancelling an Indian timber contract.

Affirmed.

1. Administrative Procedure: Burden of Proof--Indians: Generally

   In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

2. Contracts: Generally--Indians: Contracts: Generally--Indians: Timber Resources: Timber Sales Contracts: Generally

   The Uniform Commercial Code and state statutory and decisional law can be examined in determining the principles of general contract law in interpreting a contract for the logging and sale of Indian timber.

3. Contracts: Generally--Indians: Contracts: Generally

   Based upon the general law of contracts, Indian contracts contain an implied requirement that they be carried out in good faith and in accordance with standards of commercial reasonableness.

APPEARANCES: Samuel J. Stiltner, Esq., Seattle, Washington, and Neil Jorgensen, for appellant; Roger L. Hudson, Esq., Office of the Alaska Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Area Director; David S. Case, Esq., Anchorage, Alaska, for allottees Henry Jacquot, Larry Jacquot, Mary Jane Valentine, and Henry Gene Jacquot, Jr.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Winlock Veneer Company (appellant or Winlock) seeks review of an October 20, 1989, decision of the Acting Juneau Area Director, Bureau of Indian Affairs (Area Director; BIA), cancelling timber contract E00C14203082 (the contract) between appellant and the owners of Chilkat Valley Native allotments AA007884 (John Berry), AA006618 (Estate of Frederick Joseph Donnelly), 1/ AA008036 (Henry Jacquot), and AA008035 (Larry Jacquot). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

The contract was approved by the Superintendent, Southeast Agency, BIA (Superintendent), on November 27, 1987. It covered portions of secs. 14, 15, 22, 23, 26, and 27, T. 27 S., R. 55 E., Copper River Meridian, Alaska, containing 636.2 acres, more or 1ess, and provided for the logging of 556 acres. The estimated volume of the logging was 13,200 MBF (net scale) of Sitka Spruce sawlogs, 2,100 MBF (net scale) of Western Hemlock and other species, and an undetermined amount of wood logs of all species. Section A5 of the contract provided that all designated timber was to be cut and paid for by April 15, 1990, and all other obligations were to be completed before the contract expiration date of June 30, 1990. Section A13 set no minimum or maximum annual cuts, as long as all timber was cut and paid for by April 15, 1990. Because of Alaska state requirements concerning bridging the Chilkat River to obtain access to the allotments, logging was restricted to the period between November 1 and April 15 of each logging year.

Section A9 of the contract established basic stumpage rates of $73.27 per MBF for Sitka Spruce sawlogs, $10 per MBF for Western Hemlock sawlogs, and $10 per MBF (gross scale) for wood logs of all species. Section A17(h) 2/ provided two adjustments to that stumpage rate, only one of which is at issue here. 3/ As explained by the Area Director, section A17(h)2(A) and (B), as amended, 4/ establish

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1/ By order dated Dec. 4, 1987, Administrative Law Judge William E. Hammett approved the will of Frederick Joseph Donnelly, and ordered distribution of allotment AA006618 to Mary Jane Valentine, Henry Gene Jacquot, Amber Michelle Jacquot, Lawrence Eugene Jacquot, Tammy Kay Valentine, Carrie Ann Valentine, and Deanna Lynn Valentine, as tenants in common, in equal, undivided shares.

2/ Two consecutively paginated copies of the contract appear in the administrative record. No section A17 appears in either copy, although the running heads on pages 5d, 5e, and 5f mention section A17. Regardless of whether or not a paragraph designation is missing, the provision at issue here is clearly set out in the contract, and appellant has made no allegation that it was unaware of the requirement.

3/ Section A.17(h)2(B)(3) provided for an annual adjustment to the basic rate.

4/ A modification to section 17(h)2(B)(1) and (2) was submitted to appellant on Jan. 18, 1989. The modification was intended to ensure appellant's

> a profit-sharing arrangement whereby [appellant] was required to report its resale volumes and prices to BIA so that the owner's 75% share of any amount by which the resale price exceeded the adjusted stumpage rate could be calculated. It was expressly stated that the application of the 75% - 25% profit-sharing formula could not result in a reduction of the compensation owed to the allottees, but only in an increase. Because of the foreseeable volatility of the timber markets, and the substantial time lag in the application of the stumpage adjustment mechanism, this profit-share mechanism was counted on to assure the allottees compensation commensurate with the market value of their timber at the time the trees were actually harvested.

(Appellee's Answer Brief at 4-5). Appellant does not dispute this interpretation of the provision.

No logging occurred before April 1988. During the summer of 1988, BIA recalculated the base stumpage rate under section A17(h)2(B)(3). New minimum stumpage rates were set at $141.24 per MBF for spruce and $93.70 per MBF for hemlock. Appellant has not contested this adjustment.

By letter dated September 15, 1988, appellant informed BIA that it intended to assign its contractual rights to Sonora Logging, Ltd. When the assignment fell through, appellant commenced logging operations.

During the 1988-89 logging season, appellant harvested approximately 20 to 25 percent of the total cut designated under the contract. On February 15, 1989, appellant entered into Purchase Agreement No. 018902/MW with Maple Mark International, Inc. (Maple Mark), for the resale of the timber harvested under this contract.

The Area Director indicates that he did not receive a copy of this purchase agreement until May 1989. On May 12, 1989, he wrote appellant, stating:

> In reviewing the log purchase agreement and from preliminary inquiries concerning Maple Mark, we find several omissions and discrepancies which need to be clarified to enable us to verify that the agreement is an arm's-length transaction and that the prices shown reflect those actually received by Winlock Veneer.
>
> With respect to Maple Mark, the log purchase agreement you submitted predates the incorporation of Maple Mark. Additionally, records secured from the State of Washington, indicate that Maple Mark does not presently have any corporate officers with the

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fn. 4 (continued)
profit margin, which had inadvertently been reduced in the original version of the section. Appellant executed the modification on Mar. 22, 1989. Appellant does not dispute that the modification inures to its benefit.

exception of an initial director, Mr. Yoshi Tanaka. The Maple Mark signature does not appear to be that of Mr. Tanaka. These matters need to be clarified by you prior to our further review of the agreement.

With respect to the log purchase agreement, the agreement seems to be lacking in several important aspects. First, the price to be paid for logs is not specified. We find this to be highly irregular and request a final copy of a signed log agreement specifying log prices.

Secondly, we request a copy of log prices by grade and any composite calculations which you used to arrive at a camp-run price. Your use of this kind of pricing on the invoice suggests that grade was of no utility or importance when in fact we observed your staff making a concerted effort to ensure that the grades were correctly assigned and accounted for by volume. We believe that export grade was of considerable importance in determining the composite selling value.

Third, we are requesting evidence of payment with respect to dollar amount by volume of logs and other pertinent information so that we may fully verify the prices paid and received for logs shipped.

With respect to the above information, we direct your attention to section B13.8 of the contract standard provisions, "Purchaser Records." [5/] The information we are requesting may be in the form of an amendment or supplement or some sort of affidavit, but must be submitted within ten days of the date on this letter.

Pursuant to an extension granted, appellant responded to the Area Director in a June 9, 1989, letter, indicating that it did not believe investigation of Maple Mark was its responsibility; it was not required under the contract to submit a purchase order, but did so at BIA's suggestion; and it was not responsible for reporting on specific prices.

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5/ Section B13.8 of the contract provides:

"Records pertaining to the logging, manufacture and sale of material covered by the contract, by the Purchaser, his divisions and subsidiaries (wholly owned or controlled) and his subcontractors, and such other records as it may be necessary to review to confirm the statements submitted by the Purchaser, shall be open to inspection at any reasonable time by authorized Bureau employees for the purpose of obtaining information of the type used by the Bureau in appraisals and redeterminations of stumpage rates. The information so obtained shall be regarded as confidential and the right of inspection shall extend for a reasonable time beyond the expiration date of the contract to provide the Bureau an opportunity to obtain relevant information for the full contract period."

An addendum to the purchase agreement, dated March 3, 1989, was delivered to BIA on June 15, 1989. The addendum showed a price of $330 per MBF for Sitka Spruce camprun and $275 per MBF for Western Hemlock camprun.

Based upon conversations with various people in the logging industry, BIA officials questioned whether the price appellant had received in the sale to Maple Mark represented a true arm's-length negotiation. Preliminary surveys by BIA indicated that the logs could have been sold for a camprun price around $500-$600 for spruce and more than $400 for hemlock. Calculations showed that the sale price at which appellant would have been required to make additional payments to the allottees under contract section A17(h)2, was $332.45 per MBF for spruce and $279.20 per MBF for hemlock. Appellant's reported sale price to Maple Mark was $330 per MBF for spruce and $275 per MBF for hemlock. Finally, the total sale price, as listed on appellant's April 17, 1989, invoice, was $1,021,023.30. BIA learned that the entire shipment sold by appellant to Maple Mark was resold on the dock at Haines, Alaska, to Nissho Iwai American Corporation through Pacific Wealth Trading Company, Inc., for $1,480,923.55. This price to the ultimate buyer represented a difference of $459,900.25, or a 45-percent increase over the sale price received by appellant at the same sale site.

These factors led BIA to request additional information from appellant concerning the sale to Maple Mark, and to conduct a more thorough investigation into other comparable sales. On August 11, 1989, the Area Director wrote appellant, stating:

> We were disappointed that you were unable to attend the August 10 meeting we had scheduled in Anchorage at your request, but we are still ready and willing to meet with you to discuss our mutual concerns regarding performance of the above-referenced contract. We are still seriously troubled by the wide disparity between the Winlock-Maple Mark sales price, which you reported to us last Spring, and the substantially higher prices which appear to have been available in the market at that time. You should be aware that the possibility of contract suspension or cancellation action is under consideration on the basis that your firm may have breached an implied covenant to make reasonable efforts to obtain a fair price for the allottees' timber. Perhaps you could dispel our doubts about your performance in this respect through a face-to-face meeting, but we might also wish to discuss the possibility of a termination of your further contractual obligations by written agreement at such a meeting.

When no further information was received from appellant, on September 21, 1989, the Superintendent suspended appellant's right to operate under the contract, pursuant to section B2.6. 6/ The Superintendent stated:

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6/ Section B2.6 provides in pertinent part:

"The Superintendent may, after written notice to the Purchaser, suspend any or all of the Purchaser's operations under the contract if the Purchaser

This is to notify you that your operations under the above-referenced timber purchase contract are hereby suspended, effective immediately. This action is taken for the purpose of protecting the interest of allottees John Berry, Henry Jacquot, Larry Jacquot, and the heirs of Fred Donnelly, in seeing to it that no further logging takes place on their property until the matter of Winlock Veneer Company's apparent breach of the contract has been resolved.

For over six weeks now the Bureau of Indian Affairs (BIA) has been seeking an explanation directly from Winlock with respect to the substantial disparity between the timber sale's price reported by Winlock under the contract last April, and data suggesting a much higher market price which the BIA has obtained from several independent sources. During this period, representatives of your firm have repeatedly postponed and/or cancelled meetings, failed to furnish promised correspondence and documentation, and generally engaged in a course of conduct unnecessarily delaying the BIA's determination as to whether a material breach of the contract has occurred. At our August 28, 1989 meeting with Mr. Neil Jorgensen, he indicated he would present a thoroughly documented explanation of Winlock's marketing activities, which would account for and justify what otherwise appears to have been a sales price far below that available in the market. After stating on August 28, 1989 that such an explanation would be forthcoming within a week, he called the Regional Solicitor's office on two occasions to seek further extensions of the deadline.

In particular, during a September 6, 1989 telephone conversation with the Regional Solicitor's office attorney, Roger Hudson, Neil Jorgensen requested that the BIA defer issuance of a contract suspension notice, and promised to send a letter confirming that Winlock would not commence logging until the contract breach issue was resolved. No such letter was received, and it is in part on account of that circumstance that this notice of suspension is issued. During the same September 6, 1989 telephone conversation, Neil Jorgensen promised that Winlock's explanation and justification of last Spring's below-market sales price would be delivered to Mr. Hudson no later than September 18, 1989. As of the date of this writing, the government is still awaiting that presentation.

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fn. 6 continued
violates any of the requirements of the contract. * * * Such suspension of operations may be continued by the Superintendent until there is satisfactory compliance. After written notice from the Superintendent, continued failure to comply with any of the requirements of the contract shall be grounds for the revocation by the Approving Officer of all rights of the Purchaser under the contract and the Purchaser shall be liable for all damages resulting from his breach of contract."

> As the BIA Area Director stated in his letter of August 11, 1989, we have under consideration the possible cancellation of your contract. On the basis of the information presently before us, it appears that a material breach of the contract has occurred. In fairness to Winlock, and in the interest of making the best informed determination possible on the issue of contract breach, we have anxiously awaited your company's promised presentation. If we do not receive it within 10 calendar days following your receipt of this notice, we will be obliged to make a determination without your input.
>
> * * * [W]e remain anxious to receive, and would intend to carefully consider, any explanation or justification of its actions which Winlock might submit.

Appellant wrote two letters to the Superintendent, requesting clarification of what she wanted. The Superintendent responded on October 5, 1989, stating:

> We are in receipt of your October 2, 1989 memorandum and your October 4, 1989 memorandum, in which you state that you "do not understand what we want," and ask that we clarify our prior requests for explanation or justification of Winlock Veneer Company's approach to marketing the timber harvested under the above-referenced contract in 1989. We are surprised at your continued profession of confusion in light of the numerous past contacts between the Bureau of Indian Affairs (BIA), the Regional Solicitor's Office, and representatives of your firm regarding this subject * * *.
>
> Nevertheless, we will restate our concerns one more time. Our basis for suspending the contract was our preliminary determination that Winlock's sale to Maple Mark, Inc. of timber harvested during the 1988-1989 logging season constituted a breach of its implied contractual duty to use reasonable efforts to obtain a commercially reasonable sales price for the timber harvested under the contract. This duty arises by implication from the inclusion in the contract of clause A17.(h)2., which makes the timber sales price to be received by the allotment owners at least partially dependent upon the resale price obtained by Winlock. This profit sharing provision was specifically included in the contract to assure increased compensation to the allotment owners in the event of increases in the market value of the timber over the life of the contract. Our survey of the market indicates that such an increase did in fact occur, but that Winlock's sale to Maple Mark at the reported April 1989 total price of $1,021,023.30 failed to capture a reasonable proportion of the then current market value, to both your own and the allotment owners' detriment.

> What we have repeatedly tried to solicit from [Winlock] over the past two months is an account as to what efforts Winlock made to obtain a reasonable sales price, and/or what special circumstances led Winlock to sell the timber to the newly formed corporaation, Maple Mark International, Inc., for the price which was obtained, at a time when other timber sellers in the same region were obtaining significantly higher prices from other buyers for at least roughly equivalent product. Please include, if possible, a recitation as to what prospective buyers other than Maple Mark you contacted as part of your resale effort.
>
> As you should by this time be well aware, the very same timber Winlock sold to Maple Mark at the Haines dock was resold by Maple Mark while still at the dock for $1,480,923.55, a full 45 percent markup * * *. Therefore, one point Winlock should address in any explanatory submission would be why Winlock did not or could not have sold the timber at a higher price directly to Nissho Iwai American Corporation, or another export firm, or why at the very least a better price could not have been obtained from Maple Mark.
>
> In the absence of any demonstration of the commercial reasonability of Winlock's conduct in reselling the timber, the large price disparity inclines us towards the conclusion that an implied term of the contract has in fact been breached.
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> As we have repeatedly stated, we would much prefer to make our determination based on consideration of not only the circumstances recited above, but also of your justification of Winlock's conduct. We believe we have already been extraordinarily patient in awaiting your response, so we do not feel we are in a position to continue postponing a determination much longer. We must hear from you no later than October 13, 1989.

Between October 7 and 12, 1989, appellant wrote five letters to the Superintendent. These letters requested identification of 14 individuals whose names appeared in appellant's contract file; requested clarification of who contacted the Nissho Iwai American Corporation; confirmed appellant's attempts to reach the Superintendent by telephone on October 12, 1989; requested an extension of time for responding to the Superintendent's October 5, 1989, letter, and protested BIA's reaching any conclusions on the basis of its survey without input from appellant and without fully disclosing the information in the survey to appellant; and protested a proposed resale of the contract. No communication addressed the issues raised by the Superintendent.

On October 20, 1989, the Area Director issued the notice of contract cancellation under consideration in this appeal. The Area Director stated:,

> Winlock Veneer Company is hereby notified that the above-referenced timber contract is terminated, effective immediately. This action is taken on the basis of a determination

that Winlock's reported sale to Maple Mark International, Inc. of timber harvested under this contract constituted a material breach of the contract, and that such breach deprived the allotment owners of payments of at least $300,000.00 to which they were entitled under the contract.

As the Bureau of Indian Affairs (BIA) interprets this timber sale contract, Winlock as the Buyer had a legal obligation to obtain a commercially reasonable price upon any resale of logs harvested from the Seller's allotments. Although Winlock did not enter into a binding undertaking to obtain any specific resale price, the BIA finds that Winlock did have a duty to make a good faith effort to obtain a commercially reasonable price, with commercial reasonableness being evaluated relative to the prevailing market conditions at the time of any resale transaction.

This contractual duty, albeit an implied one, arises directly from the express terms of the contract relative to sales price. Specifically, Section A17.(h)2. establishes a formula for profit-sharing which requires the Buyer to pay the Seller 75% of the amount by which the actual resale price exceeds the basic appraised sales price stated in the contract. Seller's entitlement to such a profit share was clearly an important part of the consideration inducing Seller to enter into the contract in the first place. Implicit in the overall compensation scheme of the contract was Seller's legitimate expectation that it would receive additional payments under the stumpage rate adjustment formula if the prevailing resale prices in the market made such additional element of compensation available.

It is hardly credible that Winlock could have overlooked such contract provision in view of the fact that a clarifying amendment to the contract specifically relating to the profitsharing formula was under discussion during the same winter 1989 period that Winlock was cutting timber and seeking to re-sell it. After considerable delay this modification was signed on March 22, 1989. According to documentation presented by Winlock, it entered into a purchase agreement with Maple Mark International, Inc. on or about February 15, 1989, but the first and only agreement concerning price furnished to Seller by Winlock was an invoice dated April 17, 1989.

Every contract contains an implied covenant of good faith performance, and it is the finding of the BIA that an essential element of such performance on Winlock's part was the duty to make reasonable efforts to obtain fair market value in any resale transaction. Whether Winlock has violated or properly performed this implied contractual duty can be determined by the BIA in one of two ways. First, Winlock could furnish reasonably detailed information about the efforts it actually undertook to market the

timber, and thereby demonstrate the commercial reasonableness of its methodology. Alternatively, the result achieved can be evaluated by comparing the price actually obtained by Winlock with market data from the relevant time period and locale to determine whether the price obtained falls generally within the range of market prices at which other comparable transactions occurred.

The BIA has not been able to undertake any direct evaluation of Winlock's marketing methodology because Winlock has failed to furnish the necessary information about any procedures it followed and/or any analysis it conducted prior to selling the timber at issue to Maple Mark. Although such information has repeatedly been requested from Winlock, and its delivery or presentation repeatedly promised by Winlock, the BIA has not to date received any explanation of Winlock's decision to sell the timber at issue to Maple Mark at the reported price. Most recently, Winlock requested a one week extension until today, October 20, 1989, of the prior deadline for submission of an explanation of its sale of timber to Maple Mark at the reported price. Although that extension was not formally granted, the BIA has remained - and still remains - willing to consider any evidence or justification which Winlock would care to submit. Even if such information is presented after delivery of this NOTICE OF CANCELLATION, but before the appeal period expires, the BIA would review it to determine whether a sufficient basis was presented to justify reconsideration and reversal of this NOTICE OF CANCELLATION, and would act accordingly.

However, in the absence of information as to Winlock's actual marketing efforts and resale price analysis, the BIA must make its determination regarding contract compliance or breach on the basis of raw sales price comparisons. Although Winlock had no contractual duty to obtain the highest price, or even a market average price, in order to fulfill its implied obligations under the contract, the fact that the price reportedly obtained from Maple Mark was significantly lower than any other comparable transaction gives rise to a strong inference that Winlock has breached its implied contractual duty to Seller.

In fact, the evidence available to the BIA strongly supports the determination that a contract breach has occurred. To begin with, BIA forestry personnel conducted a survey of buyers and sellers involved in comparable transactions, and determined that the prices per thousand board feet obtained by Winlock for both spruce and hemlock were not only the lowest prices reported for any otherwise comparable transactions of which BIA has become aware, but they were lower by a very substantial margin. The unweighted mean FAS prices for spruce logs, excluding high grade, sold in other transactions occurring in the same period and locale, was approximately $536 per thousand board feet. For hemlock, the unweighted mean FAS price, excluding high grade, was

approximately $406 per thousand board feet. In contrast, the spruce and hemlock prices reportedly obtained by Winlock in its transaction with Maple Mark were only $330 and $275 per thousand respectively. In other words, the prices at which Winlock resold the allottees' spruce and hemlock logs to Maple Mark were respectively 38% and 32% below the average market price.

Although it is possible that a difference in the overall quality of the allottee's timber could partially account for this lower price, the price disparity is too great to be explained by such a factor. Moreover, the plausibility of such an explanation is directly contradicted by the fact that Maple Mark subsequently resold the very same logs, FAS Haines Dock, for a price over 45% higher than it paid Winlock for them. So far as the BIA is aware, Maple Mark did not move, handle, sort or in any way physically alter the logs to add to their value prior to resale to Nissho-Iwai American Corporation. Yet Nissho reported paying Maple Mark $1,480,923.55 for the identical volume of timber which Winlock reported selling for $1,021,023.30. Although offered numerous opportunities to provide an explanation for this disparity, Winlock has to date furnished none.

Accordingly, the BIA, acting as attorney-in-fact for the Seller, finds itself constrained to draw from this evidence of a very large price disparity the obvious inference that Winlock Veneer Company has breached its implied duty to make a good faith effort to obtain a commercially reasonable price upon resale of the timber cut from the Seller's allotments. Had Winlock sold the timber FAS Haines Dock to Maple Mark, Nissho-Iwai, or any other purchaser for the price which Nissho paid, the Sellers would have received under Section A17.(h)2. approximately $345,000 more than they were paid by Winlock as a result of the Maple Mark transaction. From the Seller's perspective, the amount of money they receive from Winlock in exchange for the privilege of logging their allotments goes to the very heart of the contract, and Winlock's unexplained failure to re-sell their timber for a commercially reasonable price has caused them direct and substantial financial loss. It is therefore our determination that this level of performance constitutes a material breach of the contract, fully justifying its cancellation. [Emphasis in original.]

The Area Director's decision incorrectly advised appellant that it was entitled to file a notice of appeal pursuant to 25 CFR Part 2. Appellant filed its notice of appeal with the Area Director. The documents were forwarded to the Board, which received them on December 11, 1989. 7/ A lengthy briefing period followed, with various filings being made by appellant, the Area Director, and several of the allottees.

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7/ The Board has previously held that it will accept a late-filed notice of appeal when the late filing results from an Area Director's failure to inform the parties of the proper appeal procedures, as is required by 25 CFR

Removal of Chief Administrative Judge

Appellant filed a motion on October 24, 1990, seeking the removal of the Chief Administrative Judge (Chief Judge) from this case pursuant to 43 CFR 4.317(b), which states:

> An administrative judge may withdraw from a case in accordance with standards found in the recognized canons of judicial ethics if the judge deems such action appropriate. If, prior to a decision of the Board, a party files an affidavit of personal bias or disqualification with substantiating facts, and the administrative judge concerned does not withdraw, the Director of the Office of Hearings and Appeals shall determine the matter of disqualification.

As grounds for this motion, appellant contends that the Chief judge has (1) demonstrated personal bias against appellant by (a) criticizing appellant for pursuing the appeal without representation, (b) accusing appellant of intentionally delaying the proceedings, (c) reproaching appellant for requesting a stay to attempt settlement, and (d) concurring in the Area Director's speculations concerning possible criminal wrongdoing by appellant; (2) allowed BIA to introduce inadmissible evidence; (3) failed to respond to certain of appellant's requests for information and action; (4) knowingly engaged in ex parte communications; and (5) failed to order the parties to frame the issues on appeal.

The Area Director opposed the motion, arguing that appellant's claim of bias was based solely on the fact that the Chief Judge issued certain orders during the briefing of this matter \that were not liked by appellant. The Area Director stated that the only serious allegation raised in appellant's motion related to ex parte contacts, and presented affidavits reporting two brief telephone conversations in December 1989 between the Chief Judge and counsel for the Area Director clarifying the regulations governing the appeal. The Area Director states that no prohibited ex parte communications occurred.

The Board could engage in a lengthy discussion showing each of appellant's allegations to be without basis. It is confident, however, that the record speaks for itself in this matter, and is equally confident that nothing said in this decision will dissuade appellant. The Board will, therefore, state generally that the Chief Judge has no personal bias against appellant or in favor of any BIA or Solicitor's Office official appearing in this case; the "inadmissible evidence" to which appellant objects is merely the recitation of facts as presented in the Area Director's answer brief and will be given the weight in this decision that it deserves; any outstanding

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fn. 7 (continued)
2.7(c). See, e.g., Pueblo v. Acting Sacramento Area Director, 18 IBIA 350, 351 n.2 (1990); Stillaguamish Tribe v. Portland Area Director, 18 IBIA 89, 90 n. 1 (1989).

motions will be addressed in this decision; and it is the responsibility of the parties, not the Board, to frame the issues.

Three issues raised by appellant are significant enough to require more than conclusory treatment. Appellant contends that the Chief Judge reproached it for seeking settlement. Appellant filed several documents in which it raised the possibility of settlement. In an April 6, 1990, order the Chief Judge noted these filings and indicated that it encouraged settlements. During the briefing period in this case, however, it became clear that no party other than appellant was interested in settlement. See, e.g., allottees' May 10, 1990, opposition to motion for stay of proceedings at page 1; and the Area Director's June 11, 1990, memorandum in opposition to request for stay of proceedings at page 2, footnote 3. The Board will not order parties before it to engage in useless exercises in the name of "settlement."

Appellant accuses the Chief Judge of engaging in prohibited ex parte communications with unidentified agency officials. 43 CFR 4.27(b) defines "ex parte communication" as a "communication concerning the merits of a proceeding between any party to the proceeding or any person interested in the proceeding or any representative of a party or interested person and any Office personnel involved or who may reasonably be expected to become involved in the decisionmaking process on that proceeding." (Emphasis added.) The Board does not have a staff attorney, and its secretary is not legally trained. Consequently, the administrative judges are required to handle some procedural questions. The judges are extremely conscious of the ex parte rules, and refuse to engage in conversations concerning the merits of any case pending before the Board. The Chief Judge admits that she discussed procedural matters with counsel for the Area Director, but denies that she engaged in any prohibited ex parte communication in this case with any person.

Appellant also alleges that the Chief Judge has concurred in the Area Director's speculations concerning possible criminal wrongdoing by appellant. The basis for this contention is that the Chief Judge denied appellant's request for an indefinite stay of this proceeding based on a generalized invocation of the Fifth Amendment protection against self-incrimination. This issue is addressed in depth, infra.

The Chief Judge finds no cause to withdraw from this appeal. Because appellant has failed to substantiate its allegations as required by 43 CFR 4.317(b), there is no basis for a decision on disqualification by the Director of the Office of Hearings and Appeals.

Discussion and Conclusions

[1] In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency decision complained of was erroneous or not supported by substantial evidence. See, e.g., Kays v. Acting Muskogee Area Director, 18 IBIA 431 (1990), and cases cited therein. Appellant attempts to carry its burden in this case by showing legal error in the Area Director's decision.

Appellant argues first that BIA has, in effect, rewritten the contract by implying a duty to obtain a resale price that BIA deemed "commercially reasonable." Appellant contends that no such requirement was contained within the written provisions of the contract, and that evidence of commercial reasonableness is barred by the parol evidence rule. Citing Priebe & Sons, Inc. v. United States, 332 U.S. 407, 411 (1947), and United States v. Humboldt Fir, Inc., 426 F. Supp. 292, 296-97 (N.D. Cal. 1977), aff'd, 625 F.2d 330 (9th Cir. 1980), appellant further argues that this case is governed by the Federal common law of contracts, and that state common law, but not statutory law, may be referenced in the absence of applicable Federal common law.

The Area Director contends that it is a basic proposition of contract law that every contract contains an implied covenant of good faith performance. He cites the Uniform Commercial Code (UCC), which has been codified in Alaska as Title 45 of the Alaska Statutes, Alaska case law, and the intent of the parties in support of this implied covenant of good faith performance.

[2] Humboldt Fir, which appellant cites as establishing the law to be followed in construing Federal contracts, including Indian contracts, states:

> Where Congress has not adopted a different standard, construction of Federal contracts is governed by principles of general contract law. * * * The Uniform Commercial Code, adopted in fifty jurisdictions including [Alaska], is a recognized source of general contract law. * * * In the absence of federal cases on point, state statutory and decisional law may furnish a convenient source for the general law of contracts to the extent that it does not conflict with the Federal interest in developing and protecting the use of Indian resources. * * * [Citations omitted.]

(426 F. Supp. at 296-97). Accordingly, the Board holds that the UCC and state statutory and decisional law can be examined in determining the principles of general contract law in interpreting a contract for the logging and sale of Indian timber.

As codified in Alaska, the UCC covers the sale of "goods," specifically including timber to be cut. AS 45.02.105; AS 45.02.107(b). Appellant is a "merchant" within the meaning of AS 45.02.104(a), and, as such, is required to employ "good faith," which is defined in AS 45.02.103(2) as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." The burden of proving good faith is on the party having the duty of acting in good faith. Kobuk Engineering & Contracting Services, Inc. v. Superior Tank & Construction Co. Alaska, Inc., 568 P.2d 1007, 1012 (Alaska 1977).

Furthermore, the stumpage payment adjustments in paragraph A17(h)(2) are an "open price term" within the meaning of AS 45.02.305(b), which provides that an "open price term" is "a price for the party [either the buyer

or the seller] to fix in good faith." In addition, when particulars of performance are to be specified by one of the parties, AS 45.02.311 requires that "[t]he specification must be made in good faith and within limits set by commercial reasonableness."

[3] Accordingly, the Board holds that the general law of contracts, as evidenced in the UCC and in Alaska statutory and decisional law, implies a requirement that contracts will be carried out in good faith and in accordance with standards of commercial reasonableness.

Appellant next argues that nothing in the contract gave the Area Director authority to require it to disclose marketing information, trade secrets, or other proprietary information. The Area Director relied upon section B13.8 of the contract, quoted supra in footnote 5, in requesting information from appellant. That section, to which appellant agreed by signing the contract, requires appellant to make available to BIA records pertaining to the sale of the timber harvested under the contract so that BIA can obtain information concerning appraisals and the determination of stumpage rates. Although stated slightly differently at various times, the specific information BIA has consistently sought was "an explanation directly from [appellant] with respect to the substantial disparity between the timber sales price reported by [appellant] under the contract * * *, and data suggesting a much higher market price which the BIA * * * obtained from independent sources." See Superintendent's Sept. 21, 1989, Notice of Suspension of Operations at 1. This is precisely the type of information required to be released under contract section B13.8.

Finally, appellant argues that BIA's survey information was not made part of the administrative record and therefore cannot be used in this proceeding. Item 25 in the administrative record sets forth the results of BIA's survey, by listing sales prices of spruce and hemlock by six firms about the time of appellant's sale to Maple Mark. The firms are identified as Firm X, Firm #1, Firm #2, Firm #3, Firm Y, and Firm Z. The record certification states:

> Some of the transactional data obtained from third parties in order to assess the spring 1989 Southeast Alaska timber export market, was only made available to the BIA on the basis of assurance to the informant firms that the confidentiality of such proprietary information would be respected. The original price information received was therefore recorded in a coded form on the price comparison worksheet to preserve the anonymity of reporting firms. We are now in the process of seeking permission for disclosure in its original form of the transactional information previously provided. As soon as, and to the extent that, authorization for the release of such information can be obtained, it will be provided to the Board.

In his answer brief at page 18, footnote 17, the Area Director stated that efforts to obtain permission to release this proprietary information were

continuing. The Board finds that the survey information was part of the administrative record and can be used in this proceeding. 8/

The Board holds that appellant has failed to show legal error in the Area Director's decision. Accordingly, since appellant did not present any facts to contradict the Area Director's price comparisons or to explain the apparent discrepancies, appellant would normally be found to have failed to carry its burden of proving error in the Area Director's decision.

However, after the filing of the Area Director's answer brief, in a document dated May 22, 1990, appellant contended for the first time that it was unable to respond to any of BIA's factual assertions because it had been advised by counsel that

> pending the conclusion of the investigation by the Office of the United States Attorney no statements should be made by [Neil Jorgensen] in order to preserve the rights guaranteed [him] by the Fifth Amendment to the United States Constitution. In order to fully respond in this matter it is necessary for [Neil Jorgensen] to make statements to which only he is privy or has relevant information for a full hearing.

Appellant appeared to suggest that it first became aware of the criminal investigation because of a statement made in the Area Director's answer brief .

The Board is not normally required to consider issues or arguments raised for the first time on appeal. See, e.g., Kombol v. Acting Assistant Portland Area Director (Economic Development), 19 IBIA 123 (1990), and cases cited therein. However, because of the significance of the Constitutional issue raised, the Board will consider it. For the purposes of this discussion, the Board will assume that appellant intended its Fifth Amendment argument to apply to any and all factual information appellant might be able to present.

The Area Director opposed appellant's request for stay on the grounds that (1) appellant had been aware of the on-going investigation by the Federal Bureau of Investigation since early September 1989 and, therefore, the timing of the stay request suggested it was made only for the purpose of delaying this proceeding; (2) corporations do not have a Fifth Amendment privilege against self-incrimination; (3) a broad and generalized claim of privilege should not be accepted without some plausible explanation of how the claimant might be incriminated by the response; (4) civil proceedings need not be stayed merely because a related criminal proceeding is pending; and (5) any potentially self-incriminating facts, statements, evidence, or arguments could merely be omitted from appellant's reply brief.

8/ The Board notes that appellant objects to the Area Director's supplementation of the record with the identities of the firms contacted in BIA's survey at the same time as it contends that the survey cannot be considered because the firms are not identified.

By order dated June 18, 1990, the Board declined to stay the filing of appellant's reply brief. On June 26, 1990, the Board received from appellant a document entitled "Memorandum in Support of Request for Stay." The document contains two paragraphs relating to appellant's Fifth Amendment claim, in which the statement contained in appellant's May 22, 1990, motion is repeated almost verbatim, but which adds that there is no one with relevant facts who could answer for the corporation who is not a subject of the investigation. Appellant added a request for a full evidentiary hearing in this case at the conclusion of the criminal investigation.

Appellant addressed this issue again, in two subsequent filings, in slightly different words. In a filing dated August 14, 1990, at page 3, appellant states that it had "been advised by counsel that the Fifth Amendment prevents it from undertaking a factual accounting at this time." Finally, in a filing dated October 23, 1990, at page 7, appellant argues that "[c]ounsel for [appellant] had earlier advised [appellant] not to answer any of the BIA's allegations of possible criminal wrongdoing." Appellant continues that because BIA had been "allowed * * * to introduce evidence of possible criminality onto the record * * * [appellant] was left with the impossible task of deciding whether to follow the prudent advice of counsel or to address the prejudicial evidence now on the administrative record." Id.

Appellant's arguments indicate that it fails to appreciate several aspects of this case that counsel was apparently attempting to address with his advice: (1) the recitation of facts in a brief is not "evidence" in the sense given it by appellant; (2) a judge is presumed to be able to separate facts from argument, and to recognize and disregard inflammatory and/or prejudicial statements; and (3) the question of whether or not appellant engaged in any criminal activities is irrelevant to this proceeding.

The Board notes that 18 pages of appellant's 19-page "Memorandum in Support of Request for Stay" in fact, if not in appellation, constitute an extremely detailed reply brief to the Area Director's answer brief. Again, appellant does not address any factual issues, but the memorandum fully discusses the legal arguments raised in appellant's opening brief, and relates the arguments to those in the Area Director's answer brief.

The Board holds that appellant was able to file a reply brief without a violation of any Fifth Amendment right against self-incrimination.

Additional "Notices of Appeal"

On May 17, 1990, the Board received from the Southeast Agency Superintendent, six additional "notices of appeal." The Board described these "notices of appeal" on page 2 of a May 18, 1990, order as:

> (1) an April 27, 1990, notice of appeal from a "'complaint requesting information on U.S. Department of Commerce data' referenced under [the timber sale] contract * * * dated April 16, 1990, filed with the Acting Area Director;"

> (2) an April 28, 1990, notice of appeal from a "'complaint requesting information on the allowable logging cost appraisal data' referenced under [the timber sale] contract * * * dated April 14, 1990, filed with the Acting Area Director;"
>
> (3) an April 30, 1990, notice of appeal from a "'complaint requesting the third year stumpage appraisal data' referenced under section A17HB3 of the timber sale contract * * * dated April 11, 1990, filed with the Acting Area Director;"
>
> (4) an April 30, 1990, notice of appeal from a "'complaint requesting information regarding the appellee's decision to request a bond,' dated April 13, 1990, filed with the Acting Area Director;"
>
> (5) an April 30, 1990, notice of appeal from a "'complaint to Superintendent Re: Notice of Resale' dated February 24, 1990, filed with the Superintendent;" and
>
> (6) a May 2, 1990, notice of appeal from a "'complaint requesting the return of bond monies and advance stumpage payments' which are currently held in trust, under [the] timber sale contract * * * dated April 11, 1990, filed with the Acting Area Director."

The Board stated that these "notices of appeal" were, in fact, requests for review of the inaction of a BIA official that should have been filed in accordance with the provisions of 25 CFR 2.8, which establishes procedures to be followed when a person seeks to force action by a BIA official. The Board concluded at page 3 of its order:

> Under normal circumstances, the Board would refer these "notices of appeal" back to the proper BIA official for initial consideration. In this instance, however, all of the responses which appellant alleges he has not received relate to the appeal that is presently pending. The "notices of appeal" listed above as numbers 1, 2, and 3 request information that will be relevant only if appellant prevails in this appeal. The "notice of appeal" listed as number 4 is moot because the Area Director's request that appellant be required to file an appeal bond has been withdrawn. The "notices of appeal" numbered 5 and 6 request actions that will be affected by the Board's decision on the merits of the case now before it.

Based upon the preceding discussion, the Board holds that the "notices of appeal" numbered 1, 2, 3, 5, and 6 are moot because appellant did not prevail in this appeal, and "notice of appeal" number 4 is moot because the Area Director withdrew his request for an appeal bond.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Juneau Area Director's October 20, 1989, decision, finding Winlock Veneer Company in breach of timber contract E00C14203082, is affirmed. 9/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

9/ Any outstanding motions not specifically addressed in this decision are hereby denied.